UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Lane Johnson, Plaintiff, -v- National Football League Players Association, et al., Defendants.	No. 1:17-cv-05131 (RJS) Judge Richard J. Sullivan

Plaintiff David Lane Johnson's Memorandum of Law in Opposition to Defendant NFLPA's Motion for Summary Judgment[1]

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[1] Prior to this filing, Plaintiff David Lane Johnson requested discovery under Civil Rule 56(d). *See* Doc. No. 141. The Court denied this request. *See* Doc. No. 150. In doing so, the Court has prohibited Johnson from obtaining any discovery throughout the entirety of this litigation, including after the Court denied, in part, the NFLPA's Motion to Dismiss. Additionally, the Court permitted the NFLPA to file its Motion for Summary Judgment without ever answering Johnson's Amended Complaint. *See* Doc. No. 131 at 1.

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INTRODUCTION

In the middle of 2016, David Lane Johnson ("Johnson") faced severe discipline from the National Football League and the National Football League Management Council (together the "NFL") under the NFL Policy on Performance-Enhancing Substances 2015 ("Policy") (Doc. No. 39-1). When it became clear his union had no intention of protecting or standing up for his rights, Johnson exercised his protected right to speak out. In response, the National Football League Players Association ("NFLPA") retaliated against Johnson, including refusing to provide Johnson the most basic of information -- a complete copy of the Policy, upon his request.

The NFLPA claims it provided a complete copy of the Policy to Johnson on October 16, 2018 -- more than two years after Johnson requested it to prepare for his arbitration. In making this claim, the NFLPA admitted it violated Section 104 of the Labor Management Reporting and Disclosure Act ("LMRDA"). Whether the NFLPA's October 16, 2018 production constitutes a complete copy of the Policy is a material issue of fact. The NFLPA's conclusory statement that it provided a complete copy of the Policy, which the Court has prohibited Johnson from challenging through discovery, does not resolve this material issue of fact. Here, even without the benefit of discovery, Johnson has identified numerous provisions, modifications, and deviations to the Policy that the NFLPA continues to withhold in violation of the LMRDA.

The NFLPA admits it violated the LMRDA by providing Johnson what it claims is a complete copy of the Policy (it is not) more than two years after he requested it to prepare for his arbitration. Even if the documents the NLFPA provided constitute a complete copy of the Policy, Johnson is entitled to a jury trial regarding the scope of his damages, which include more than his receipt of the complete policy. If any party deserves summary judgment in its favor, it is Johnson.

PROCEDURAL HISTORY

On January 6, 2017, Johnson filed his original Complaint and Petition to Vacate Arbitration Award. Doc. No. 1. The NFLPA filed its Answer on February 1, 2017. Doc. No. 28. On February 13, 2017, Johnson filed his Amended Complaint and Petition to Vacate Arbitration Award (Doc. No. 39), in which Johnson added numerous averments (*see*, e.g., Doc. No. 39 at ¶¶ 307, 311, 312), a new retaliation/discipline claim under the LMRDA (*see* Doc. No. 39 at ¶ 314), and an additional cause of action (*see* Doc. No. 39 at Tenth Cause of Action).

Johnson's original Complaint included a claim against the NFLPA under Section 104 of the LMRDA (29 U.S.C. § 414) for failing to provide him a complete copy of the Policy. In his Amended Complaint, Johnson added an LMRDA claim under Sections 101, 102, and 609 (29 U.S.C. §§ 411, 412, 529) for the NFLPA improperly disciplining and retaliating against him for asserting his LMRDA rights. The NFLPA filed a Motion to Dismiss Johnson's claims. *See* Doc. No. 109. As part of that briefing, the NFLPA only requested the dismissal of Johnson's Section 104 claim (*see* Doc. No. 109 at 22-24, Doc. No. 119 at 10), which he Court denied (*see* Doc. No. 125 at 16-17). In its LMRDA analysis, the Court made no reference to Johnson's discipline/retaliation claim. *See* Doc. No. 125 at 16-17. The Court adjourned the NFLPA's deadline to answer Johnson's Amended Complaint. *See* Doc. No. 131 at 1.

On November 9, 2018, the NFLPA filed its Motion for Summary Judgment. Shortly thereafter, Johnson sought discovery under Civil Rule 56(d). *See* Doc. No. 141. The NFLPA filed its letter response. *See* Doc. No. 144. The Court ordered Johnson to reply to the NFLPA's opposition (*see* Doc. No. 146), which Johnson did (*see* Doc. No. 149). The Court denied Johnson's Civil Rule 56(d) motion. *See* Doc. No. 150. As part of its Order, the Court stated it previously dismissed Johnson's retaliation claim under the LMRDA. *See* Doc. No. 150 at 2.

THE DISPUTED FACTS

Genuine issues of material fact exist that preclude the Court from granting summary judgment. Much of the Policy, including its alleged amendments, modifications, and oral agreements, remains a mystery. As Johnson arbitrated his discipline, every time the Policy seemed clear, the NFL explained that a deviation existed from the plain terms of the Policy adverse to Johnson's position. When Johnson requested the terms of these alleged deviations or modifications from the NFLPA, the NFLPA refused to provide them and even suggested that Johnson obtain them from the NFL. *See* Ex. 1 (Declaration of David Lane Johnson) at ¶ 3.

Only through this litigation has Johnson received some alleged modifications to the Policy (e.g., purported information regarding the alleged Chief Forensic Toxicologist ("CFT") amendment). However, these alleged modifications created more unanswered questions (e.g., the CFT amendment is to the "2014 policy on Performance-Enhancing Substances" and not the 2015 Policy Johnson requested), and many modifications remain unidentified and unexplained.

Throughout the course of this dispute, the NFLPA has taken inconsistent positions as to the Policy's terms and whether they have been amended. The NFLPA previously told another federal court that an amendment to the Policy's arbitrator requirements existed, and this Court should prohibit the NFLPA from now telling this Court the exact opposite.

With this Opposition, Johnson files his Local Rule 56.1 Statement of Material Facts.

I. THE POLICY PRODUCED BY THE NFLPA REMAINS INCOMPLETE

The NFLPA does not contest that Johnson requested a complete copy of the Policy, including any amendments, modifications, or deviations to the Policy. *See* Ex. 1 at ¶ 3. The NFLPA claims, more than two years after Johnson's arbitration, that "on October 16, 2018, the NFLPA produced to Johnson a complete copy of 2015 Policy and all agreements thereunder

(including side letters and modifications to the 2015 Policy)." Doc. No. 135 at 3. As part of its production of the Policy, the NFLPA provided a letter dated April 22, 2013 and screen shots of player certifications. Doc. No. 135 at 3-4. Prior to the NFLPA's October 16, 2018 production, Johnson never received these Policy documents. Ex. 1 at ¶ 6.

The following is a list of Policy amendments/deviations/modifications and documents referenced and incorporated into the Policy that the NFLPA continues to withhold:

A. The CFT Amendment

The NFLPA continues to reference a letter amending the 2014 policy -- not the relevant 2015 Policy -- regarding the CFT. *See* Doc. No. 135 at 3. The amendment reads, "[t]his letter reflects our agreement to modify ***the 2014 Policy***…" Doc. No. 137-7 (emphasis added). Johnson has noted this 2014/2015 discrepancy in multiple filings throughout this lawsuit, but the NFLPA still has not explained how an amendment to the 2014 policy applies to the 2015 Policy applicable here, particularly where the 2016 policy incorporates this CFT amendment but the 2015 Policy does not. *See* Ex. 2 (NFL Policy on Performance-Enhancing Substances 2016) at 28 (previously filed in its entirety at Doc. No. 61-2); *compare* Doc. No. 39-1 at 27.

B. Amendment Regarding the Number of Arbitrators

The Policy requires three to five arbitrators be available for appeals. *See* Doc. No. 39-1 at 13-14. It is undisputed that at the time of Johnson's arbitration only two arbitrators existed. During Johnson's arbitration, NFL in-house attorney Kevin Manara stated, "the bargaining parties agreed on their own to hire two arbitrators, instead of three." Doc. No. 52-6 at 18:25-19:2; *see also* Doc. No. 52-6 at 20:12-16 ("we agreed that we would hire two arbitrators"). The Policy's sister policy -- the Policy and Program on Substances of Abuse -- also includes an identical three to five arbitrator requirement. *See* Doc No. 59-1 (NFL Policy and Program on

Substances of Abuse 2015 that the NFLPA filed) at 23; *see also* Doc. No. 52-16 at 23. When attempting to explain why the Substances of Abuse policy only had two arbitrators, the NFLPA's counsel explained to the District Court for the Northern District of Ohio that:

> The parties to the CBA—the NFL and the NFLPA—***mutually consented to modify their agreement*** and not appoint a third arbitrator because there are simply not enough appeal hearings under the Policy to justify having three arbitrators in rotation.

See Ex. 3 (NFLPA "Position Statement [Corrected]") at 2 (emphasis added); *see also* Ex. 3 at 6 (same). As part of that same case, the NFLPA stated that, as of December 2016, the NFLPA was unsure whether the modification allowing only two arbitrators was in writing but that the modification applied to the Policy and Program on Substances of Abuse and the Policy at issue in this case "for a couple of years". *See* Ex. 4 (hearing transcript) at 12:6-14:20.

Despite its prior admission a modification exists, the NFLPA has produced nothing concerning a modification allowing only two arbitrators. *See* Doc. No. 135 at 3-4; *see also* Ex. 1 at ¶ 4. In direct conflict with its prior statements to the District Court for the Northern District of Ohio, the NFLPA now claims "[t]here is no other agreement on this subject to produce." Doc. No. 135 at 9. Either the NFLPA lied to the District Court for the Northern District of Ohio or it has lied here. Caught in its own lie, the NFLPA now references a December 1, 2016 letter it provided Johnson on October 25, 2017 -- more than a year after Johnson's October 2016 arbitration -- in which the NFL and NFLPA appointed a third arbitrator. *See* Doc. No. 135 at 5.

The NFL, in its Answer to Plaintiff's Amended Complaint, admitted no written modification to the three to five arbitrator requirement existed. *See* Doc. No. 39 at ¶ 176; Doc. No. 103 at ¶ 176. If this is true, the modification must be oral. But the NFLPA stated oral agreements are prohibited (Doc. No. 135 at 11), and its in-house attorney Heather McPhee stated

she does not "believe" there were any "oral agreements between the NFLPA and the NFL to modify the 2015 Policy." Doc. No. 139 at ¶ 2.

Further creating a genuine issue of material fact, during Johnson's underlying arbitration, NFL in-house attorney Kevin Manara admitted that "the ***bargaining parties agreed on their own*** to hire two arbitrators, instead of three." *See* Doc. No. 52-6 at 18:25-19:2 (emphasis added); *see also* Doc. No. 52-6 at 20:12-16 ("we agreed that we would hire two arbitrators").

The NFL claims there is no written modification and the NFLPA claims there is no oral modification, so what agreement did Mr. Manara reference? What modification did the NFLPA reference before the Northern District of Ohio? The NFLPA's prior statements to the Northern District of Ohio and Mr. Manara's admission conflicts with the NFLPA's current position that no modification exists (*see* Doc. No. 135 at 9), including Stephen Saxon's declaration (*see* Doc. No. 138 at ¶ 5). These conflicting statements create a genuine issue of material fact as to whether the NFLPA has, in fact, provided a complete copy of the Policy.

C. The Missing Policy Protocols and Procedures

As detailed more fully below, documents referenced in the Policy are part of the Policy, and the NFLPA was required to produce such documents to Johnson upon his request. The Policy requires that testing for prohibited substances is "conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory (herein collectively 'the Collection Procedures')." Doc. No. 39-1 at 16. To date, the NFLPA has never provided the Collection Procedures. *See* Ex. 1 at ¶ 4. The NFLPA should have the Collection Procedures, as the Policy requires the NFLPA to review and approve them annually. *See* Doc. No. 39-1 at 4 (the collection protocols "shall be reviewed and approved annually by the Parties…and may not be changed without approval of both Parties"). The Policy

also includes, "procedures for handling of NFL Player specimens following laboratory analysis, which shall be subject to approval by the Parties." Doc. No. 39-1 at 20. Likewise, the NFLPA has never provided the specimen handling procedures. *See* Ex. 1 at ¶ 4.

The NFLPA does not dispute that Johnson requested the Collection Procedures, including the collection protocols and specimen handling procedures. Despite Johnson's requests, the NFLPA has never provided them. *See* Ex. 1 at ¶¶ 3-4.

Even if that is not enough, the NFL has admitted "protocols" exist under the Policy, which have been withheld from Johnson. *See* Doc. No. 116-20 (attached as Ex. 6) ("Had Mr. Johnson's specimen tested positive for substances other than [REDACTED] the ***corresponding protocols would have been included***" in what was produced) (emphasis added). The NFLPA received this email and never refuted the protocols' existence. The Policy references and incorporates the entirety of the protocols, not just those applicable to the substance for which Johnson allegedly tested positive. While Johnson requested all protocols, including those the NFL previously identified as withheld from him, the NFLPA has never produced them to Johnson. *See* Ex. 1 at ¶¶ 3-5. The NFLPA's October 16, 2018 letter does not address and is completely devoid of the protocols the NFL identified. *See* Doc. No. 137 at Ex. A-1. Based upon this email alone (Ex. 6), an email that the NFL copied the NFLPA, including McPhee, it is beyond dispute that the NFLPA has not produced the complete Policy. The McPhee and Saxon affidavits stating the opposite are false and create genuine issues of material fact.

As the Court recognized, having a complete copy of the Policy would have "helped" Johnson evaluate his Policy rights. *See Doc.* No. 125 at 8; *see also* Ex. 1 at ¶ 7. This is particularly true of the Collection Procedures, as the Policy permits a player to challenge whether a test was conducted in accordance with the Collection Procedures. *See* Doc. No. 39-1 at 17.

Johnson attempted to argue his discipline was improper because there was a deviation from the Collection Procedures. *See* Doc. No. 61-9 at 5-6. However, the NFLPA, Johnson's own union, foreclosed Johnson's ability to address this issue fully during his arbitration, because it withheld the Collection Procedures from him.

D. Amendment to the Two-Year Testing Period

Generally, the Policy allows the NFL to conduct reasonable cause testing for no more than two-years. Doc. No. 39-1 at 6. In its Memorandum and Order, the Court noted that "the NFLPA has still not produced a copy of the side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing." Doc. No. 125 at 17.

The NFLPA admits it has not produced this side agreement, stating no such side agreement exists. Doc. No. 135 at 9. Instead, the NFLPA suggests the Policy's Independent Administrator John Lombardo determined how long a player remains in reasonable-cause testing. Doc. No. 135 at 9. The NFLPA's suggestion fails for three separate reasons.

First, the Policy does not say Dr. Lombardo decides. Second, the Court previously determined the NFLPA, with the NFL (not Dr. Lombardo), reached an agreement regarding the reasonable cause testing period. *See* Doc. No. 125 at 12 ("the NFLPA and NFLMC interpreted the language 'placed into the reasonable cause testing program' as referring to the moment when a player's name is actually removed from the general random testing pool and his reasonable-cause testing is initiated"); *see also* Doc. No. 39-2 at ¶ 6.15 (Arbitrator Carter also recognized that the NFLPA and NFL agreed how the two-year reasonable cause period "was to be applied in practice"). Third, if Dr. Lombardo is responsible for applying and designating the reasonable-cause testing period, an agreement (oral or written) should exist reflecting this responsibility.

Dr. Lombardo testified under oath that he presented to the NFLPA and NFL "what [he] was going to do" as to the application of the testing period. Doc. No. 52-4 at 170:4-17. Regardless of who was responsible for setting the two-year period, the NFLPA knew of this agreement or modification to the Policy, and never shared its knowledge with Johnson, despite his requests for this exact information. *See* Ex. 1 at ¶¶ 3-5, 11. Instead, when asked by Johnson, the NFLPA could not explain how the two-year testing period worked, failed to provide Johnson any information from Dr. Lombardo, and indicated no such agreement existed. *See* Ex. 1 at ¶ 11.

Prior to Johnson's arbitration, the NFLPA supported and agreed with Johnson's plain reading of the two-year period set forth in the Policy, including that the NFL should not have subjected Johnson to reasonable cause testing at the time of his "positive" test. *See* Ex. 1 at ¶ 11. The NFLPA's statements that no such amendment or alteration to the simple and straightforward language in the Policy existed strengthened Johnson's resolve to appeal his discipline (i.e., he detrimentally relied on the NFLPA's statements to establish the substance of his appeal). *See* Ex. 1 at ¶ 11. It was not until Johnson's arbitration that the NFLPA suggested it knew of this Policy modification requiring a different reading of the two-year period. *See* Ex. 1 at ¶ 11. To date, the NFLPA has not provided this modification to Johnson. *See* Ex. 1 at ¶ 3-5, 11.

E. Other Unknown Modifications and Amendments

Absent discovery, it is impossible to know if there are other modifications and amendments to the Policy that the NFLPA has not provided. Regarding the McPhee and Saxon declarations, both of which suggest they "believe" there are no other amendments other than those the NFLPA provided on October 16, 2018, neither declaration provides a foundation as to why the Court should give these statements any credence. Neither declaration attests that all amendments or modifications must go through the declarant or that the declarant is solely

responsible for negotiating, approving, or even maintaining all amendments and modifications. That the two "believe" or are "not aware" of amendments hardly establishes conclusive facts for purposes of a summary judgment motion. *See* Doc. No. 138 at ¶ 5; Doc. No. 139 at ¶ 2. Furthermore, when "the facts of a case turns on credibility, a triable issue of fact exists, and the granting of summary judgment is error." *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949).

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute exists "where the evidence is such that a reasonable jury could decide in the non-movant's favor." *Beyer v. County of Nassau*, 524 F.3d 160 (2d Cir. 2008). Only when "a reasonable fact-finder ***could never*** accept the nonmoving party's version of the facts" is there no genuine dispute. *See Kaplan v. City of New York*, No. 14 Civ. 4945 (RJS), 2018 U.S. Dist. LEXIS 68924, *22 (S.D.N.Y. March 22, 2018) (emphasis added). "The court 'is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Pugh v. Goord*, 571 F. Supp. 2d 477, 488 (S.D.N.Y. 2008) (Sullivan, J.) (*citing Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004).

"Summary judgment is a drastic remedy to be granted only where requirements of Rule 56 have clearly been met." *United States v. Bosurgi*, 530 F.2d 1105, 1110 (2d Cir. 1976). This is especially true when the nonmoving party has not had an opportunity for pretrial discovery. *National Life Ins. Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1975). "[W]hen the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted

when he is denied reasonable access to potentially favorable information." *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Furthermore,

> summary judgment should only be granted if ***after discovery***, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. ***The nonmoving party must have had the opportunity to discover information*** that is essential to his opposition to the motion for summary judgment.

Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (emphasis added).

LAW AND ARGUMENT

I. GENUINE ISSUES OF MATERIAL FACT EXIST PRECLUDING SUMMARY JUDGMENT AS TO JOHNSON'S LMRDA CLAIMS

The LMRDA's Declaration of Findings, Purposes, and Policy expects unions to "adhere to the highest standards of responsibility and ethical conduct in administering [their] affairs…" 29 U.S.C. § 401. Part of the purpose of the LMRDA is to ensure that unions, like the NFLPA, do not "disregard…the rights of individual members." *Id.* In violation of the LMRDA, the NFLPA has done just that -- disregarded Johnson's rights.

A. In Violation of Section 104 of the LMRDA, the NFLPA Has Not Provided Johnson a Complete Copy of the Policy

Section 104 of the LMRDA requires unions:

> to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement.

29 U.S.C. § 414. The U.S. Department of Labor's Office of Labor-Management Standards ("OLMS") is responsible for administering Section 104 of the LMRDA and has authority to enforce Section 104. The Court should defer to OLMS' reasonable interpretations of Section 104, as set forth in its Interpretative Manual. *See Molina v. Union Independiente Autentica de la AAA*, 555 F. Supp.2d 284, 288 (D.P.R. 2008) ("judicial deference applies to the guidelines that

the Labor Department's Office of Labor-Management Enforcement has developed and set out in…its Interpretive Manual").

Per the OLMS, the collective bargaining agreement includes all side letters, amendments, modifications, etc. *See* Ex. 5 (excerpts from OLMS Interpretative Manual) at § 110.300 ("any subsequent agreement or amendment, oral or written, which modifies the basic agreement becomes a part of the collective bargaining agreement"). Section 104 also applies equally to written and oral agreements. *See* Ex. 5 at § 110.305. Where parties orally amend a collective bargaining agreement, the union is required to maintain "a written statement of all terms arrived at orally." *See* Ex. 5 at § 110.305.

It is undisputed that, at the time of Johnson's arbitration, there were only two Policy arbitrators. It is further undisputed that the NFLPA previously told another federal court that the NFLPA and NFL agreed to modify the Policy to allow only two arbitrators. The NFLPA has never provided Johnson the amendment allowing fewer than the three to five arbitrators required by the Policy or the amendment relating to the timeline for reasonable cause testing. *See* Ex. 1 at ¶ 4. To the extent either amendment is oral, the NFLPA also has not provided Johnson a written statement of the terms arrived at orally, as required by the LMRDA. *See* Ex. 1 at ¶ 4.

Documents referenced and incorporated into a collective bargaining agreement also become part of the agreement. *See* Ex. 5 at § 110.300. A union must produce them upon a member's request. *See* 29 U.S.C. § 414. The Policy's Collection Procedures, including the collection protocols and specimen handling procedures, are part of the Policy and even require the regular approval of the bargaining parties. *See* Doc. No. 39-1 at 4, 16, 20. Despite Johnson's repeated requests, the NFLPA has never provided these documents to him. *See* Ex. 1 at ¶¶ 3-4.

Johnson contests that he has received a complete copy of the Policy. *See* Ex. 1 at ¶¶ 3-5. Whether the NFLPA provided Johnson the complete Policy is the ultimate fact relevant to Johnson's claim under Section 104 of the LMRDA. Where, like here, the plaintiff attests that he has not received a copy of the collective bargaining agreement, summary judgment is improper. *See Leavey v. Int' Bhd. of Teamsters-Theatrical Teamsters Local Union No. 817*, No. 13-cv-0705 (NSR), 204 L.R.R.M. 3420, 2015 U.S. Dist. LEXIS 135509, *16-17 (S.D.N.Y. Oct. 5, 2015).

In *Leavey*, the plaintiff testified he did not receive a copy of the collective bargaining agreement, and the union could not "definitively establish" that he had. *Id*. at *17. Based on plaintiff's testimony, the court denied the union's request for summary judgment on the plaintiff's Section 104 LMRDA claim. *Id*. Neither McPhee nor Saxon definitively state that the NFLPA produced the entire Policy to Johnson. To the contrary, they state that they "believe" the NFLPA has done so. Johnson disagrees that the NFLPA has produced a complete copy of the Policy. *See* Ex. 1 at ¶¶ 3-5. Based on the reasoning in *Leavey*, the Court should deny the NFLPA's Motion for Summary Judgment.

Even if the Court concluded that the NFLPA provided a complete copy of the Policy to Johnson (more than two years after he requested it), the NFLPA's production does not moot Johnson's Section 104 claim. The *Gonzalez v. Local32BJ* case cited by the NFLPA to suggest it could moot Johnson's Section 104 claim by providing him a complete copy of the Policy is distinguishable from the present facts.

In *Gonzalez*, the plaintiff claimed his union violated his right to receive a copy of the collective bargaining agreement. *Gonzalez*, No. 09 Civ. 8464 (SHS) (RLE), 2010 WL 3785436, 2010 U.S. Dist. LEXIS 102971 at *10 (S.D.N.Y. Sept. 7, 2010). However, in his complaint, the plaintiff averred that he received the agreement and even attached a copy of it to his complaint.

Id. Furthermore, the plaintiff did not plead that he requested a copy of the agreement, a prerequisite to his LMRDA claim. *Id*. Based on these facts, the court found that "since Gonzalez has a copy of the Agreement, the issue is moot and he has no [Section 104] claim."

Here, Johnson plead that he requested and did not receive the subject collective bargaining agreement. *See* Doc. No. 39 at ¶¶ 307-13. This Court also recognized Johnson still does not have "a copy of the side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing." *See* Doc. No. 125 at 17. Accordingly, Johnson's claim remains anything but moot.

The other case on which the NFLPA relies – *Mazza v. Dist. Council of N.Y.* – also is distinguishable. In that case, it was "undisputed that plaintiff made no request for a copy of the CBA prior to discovery". *Mazza*, No. CV-00-6854 (BMC) (CLP), No. CV-01-6002 (BMC) (CLP), 2007 WL 2668116, 2007 U.S. Dist. LEXIS 65965 at *39 (E.D.N.Y. Sept. 5, 2007). Furthermore, plaintiff Mazza, despite filing multiple complaints, never included a LMRDA claim in his pleadings and, at best, sought to bring such a claim as part of his opposition to defendants' motion for summary judgment. *Id*. In dicta, the court reasoned that since the union ultimately provided plaintiff with a copy of the agreement, after the plaintiff presumably requested it in discovery, the union complied with the LMRDA. *Id*. at *40. Here, Johnson actually pled LMRDA claims, including his requests for the pertinent collective bargaining agreement and its various side letters, amendments, etc. *See* Doc. No. 39 at ¶¶ 304-315.

Contrary to the assertions made by the NFLPA, neither *Gonzalez* nor *Mazza* stand for the proposition that the NFLPA can moot Johnson's LMRDA claim or that Johnson's damages under the LMRDA are limited to Johnson's receipt of the collective bargaining agreement. Regardless, a factual dispute as to whether Johnson received the entire agreement remains.

Other than calling it "absurd," the NFLPA offers little response to Johnson's practical argument. Indeed, unions could withhold collective bargaining agreements without consequence if the Court permits the NFLPA to avoid legal consequences after withholding the Policy for more than two years after Johnson requested it. *See* Doc. No. 135 at 12. If the NFLPA can provide the Policy now and walkaway without impunity, what incentive does the NFLPA have to produce the Policy in a timely fashion to an outspoken member? Likewise, absent an adequate remedy to Johnson, seeking to enforce the LMRDA through litigation becomes cost-prohibitive to most union members. The LMRDA's purpose of ensuring unions uphold the rights of their individual members could never support such a result. *See* 29 U.S.C. § 401.

B. Johnson Suffered Injury in Fact

In its motion to dismiss, the NFLPA unsuccessfully argued that Johnson has not suffered injury in fact. *See* Doc. No. 109 at 9-12. In its Motion, the NFLPA recycles the same standing argument that "all of Johnson's *alleged* injuries flow from the adverse arbitral award." Doc. No. 135 at 14 (emphasis in original). The Court previously rejected this exact argument stating:

> "[A] plaintiff suffers a sufficiently concrete injury to confer Article III standing when she is denied access to information that, in the plaintiff's view, must be disclosed pursuant to a statute and when there is 'no reason to doubt' that the information would help the plaintiff within the meaning of the statute." McFarlane v. First Unum Life Ins. Co., 274 F. Supp. 3d 150, 161 (S.D.N.Y. 2017) (quoting Fed. Election Comm'n v. Akins, 524 U.S. 11, 21 (1998)). Here, there is no reason to doubt that had the NFLPA fulfilled its LMRDA duty to provide Johnson with a fully copy of the operative collective bargaining agreement, Johnson's ability to understand his rights under the collective bargaining agreement would have been "helped." Again, ***the NFLPA's assertion that Johnson lacks standing to assert his LMRDA claim because he has not shown that the alleged LMRDA violations altered the outcome of the arbitration applies the wrong causation standard to the standing analysis***.

Doc. No. 125 at 8 (emphasis added). For the reasons this Court previously articulated, the NFLPA's recycled standing argument fails. Even as to the Arbitral Award, Johnson could not

have "had a full and fair hearing" absent a complete copy of the Policy under which the NFL disciplined him. *See Smith v. American Federation of Musicians*, No. 68 CIV 2937, 80 L.R.R.M. 3063, 1972 U.S. Dist. LEXIS 13898, *17 (S.D.N.Y. May 4, 1972) (union member cannot have a full and fair hearing where union refused to provide him a copy of the collective bargaining agreement directly affecting his rights).

Furthermore, separate and apart from the Award, the NFLPA injured Johnson by refusing to provide Johnson a complete copy of the Policy upon request -- something it still has not done. Absent a complete copy of the Policy, Johnson could not evaluate his rights. Ex. 1 at ¶ 7; *see also* Doc. No. 125 at 8 (a copy of the Policy would have "helped" Johnson understand his rights). Indeed, Johnson has expended time, money, and resources seeking to enforce his LMRDA rights. Ex. 1 at ¶ 8. The NFLPA also injured Johnson by retaliating against him for asserting his rights, which retaliation also has damaged Johnson's reputation. Ex. 1 at ¶ 9.

II. JOHNSON BROUGHT A LMRDA RETALIATION CLAIM BASED ON FACTS THE NFLPA DOES NOT CHALLENGE[1]

Section 102 of the LMRDA provides Johnson freedom of speech "to express any views" he may have. Mr. Johnson exercised his protected free-speech right when he spoke out publically against the NFLPA and said, among other things, "the NFLPA does not stand up for players." *See* Ex. 1 at ¶ 2. In response, the NFLPA publically attacked Johnson and made false statements to the media. *See* Ex. 1 at ¶ 2. The NFLPA also retaliated against Johnson (i.e., improperly disciplined him under the LMRDA) by:

- Refusing to provide [him] a full explanation/copy of the Policy, including all modifications, side letters, etc., in violation of the LMRDA;

[1] In the Order denying Johnson's request for discovery under Civil Rule 56(d), the Court stated it dismissed Johnson's LMRDA retaliation/discipline claim, "as part of Johnson's duty of fair representation claim." Doc. No. 150 at 2. Prior to filing its Motion for Summary Judgment, the NFLPA never addressed this claim. *See* Doc. No. 109 at 22-24 and Doc. No. 119 at 10.

- Colluding with the NFL to sabotage [Johnson's] discipline appeal;
- Refusing to assist [Johnson] with [his] discipline appeal; and
- Refusing to state its support for [Johnson] at [his] discipline appeal.

See Ex. 1 at ¶ 10. Throughout this litigation, Johnson has remained critical of the NFLPA, which has continued to retaliate against him by withholding the Policy from him. *See* Ex. 1 at ¶¶ 2, 10.

The NFLPA does not refute or address the facts underlying Johnson's retaliation or discipline claim under the LMRDA. Instead, the NFLPA argues: (A) Johnson's Amended Complaint does not include such a claim; (B) Johnson abandoned the claim by not raising it in response to the NFLPA's motion to dismiss briefing (the NFLPA did not seek the dismissal of this claim); and (C) the Court addressed the claim (despite the NFLPA never seeking its dismissal). *See* Doc. No. 135 at 12-14. Each of these arguments lacks merit.

A. Johnson's Amended Complaint Plainly Includes a LMRDA Retaliation Claim

In Johnson's Ninth Cause of Action for "Violations" of the LMRDA, Johnson alleged:

> The NFLPA's misconduct, as detailed herein, constitutes discipline or retaliation against Johnson for asserting his rights under the LMRDA.

See Doc. No. 39 at ¶¶ 314. Johnson further alleged:

> The NFLPA's retaliation, includes, but is not limited to:
>
> a. Refusing to assist or support Johnson with his appeal;
> b. Refusing to provide Johnson with information and documents he requested;
> c. Refusing to provide Johnson a complete copy of the 2015 Policy; and
> d. Issuing an inaccurate statement against Johnson's interest.

Doc. No. 39 at ¶ 287. These averments remain separate and apart from Johnson's LMRDA Section 104 claim concerning the NFLPA's improper withholding of the Policy. Johnson added the above excerpted averments to his Amended Complaint. While the NFLPA has not answered these averments under Civil Rule 12, the NFLPA cannot throw pixie dust at them and wish them out of Johnson's Amended Complaint.

Title I of the LMRDA prohibits a union from retaliating against or disciplining a member for asserting rights provided the member under the LMRDA's Bill of Rights, which are delineated in Title I. *See* 29 U.S.C. § 411. Section 609 of the LMRDA also prohibits a union from "disciplin[ing] any of its members for exercising any right to which he is entitled under the provisions of [the LMRDA]." 29 U.S.C. § 529. Paragraph 314 of Johnson's Amended Complaint intentionally references discipline invoking Title I and Section 609 of the LMRDA.

Johnson's Amended Complaint, including the excerpted language above, flatly contradicts the NFLPA's argument that "Johnson has never once invoked [the LMRDA's discipline/retaliation] provision in any of his complaints…" Doc. No. 135 at 13. Furthermore, the Court recognized that Johnson's Amended Complaint includes a claim for discipline/ retaliation under the LMRDA. *See* Doc. No. 150 at 2.

That the NFLPA argues Johnson did not bring a retaliation claim under the LMRDA only demonstrates that the NFLPA never sought the claim's dismissal. Yet, somehow the Court dismissed Johnson's LMRDA retaliation claim, despite never being asked to do so.

B. The NFLPA Has Never Sought the Dismissal of Johnson's LMRDA Retaliation Claim

The NFLPA next argues Johnson abandoned his retaliation claim by not raising it. This too is inaccurate. Prior to the NFLPA filing its motion to dismiss, the parties filed a joint letter to the Court in which Johnson described his ninth cause of action for violations of the LMRDA, as the NFLPA "refusing to provide Johnson a complete copy of the Policy ***and retaliating against him for asserting his rights***, 29 U.S.C. 401 *et seq*." Doc. No. 85 at 2 (emphasis added).

Despite this bolded language, in its motion to dismiss briefing, the NFLPA did not address Johnson's LMRDA retaliation claim. *See* Doc. No. 109 at 22-24, Doc. No. 119 at 10. Thus, Johnson had no need to address his LMRDA retaliation claim in opposition to the

NFLPA's incomplete briefing. After the Court denied the NFLPA's motion to dismiss his claim under Section 104 of the LMRDA, Johnson again identified his LMRDA retaliation claim in a joint letter to the Court. *See* Doc. No. 126 at 1.

Since adding his LMRDA retaliation claim to his Amended Complaint on February 13, 2017, Johnson has never abandoned it. Rather, the NFLPA has ignored and failed to address the claim. In yet another misrepresentation, the NFLPA states, "Johnson never once couched his retaliation allegations as an LMRDA violation until after the Court dismissed every other one of his causes of action." Doc. No. 135 at 14. This is false, as ***prior to*** the NFLPA filing its motion to dismiss, Johnson specifically referenced his LMRDA retaliation claim in a joint filing with the NFLPA. *See* Doc. No. 85 at 2.

C. The Court Has Not Addressed Johnson's Factual Allegations Underlying His Retaliation Claim

This Court has never addressed Johnson's LMRDA retaliation claim, presumably because the NFLPA did not seek dismissal of the claim. *See* Doc. No. 125 at 16-17. Rather, the Court analyzed Johnson's duty of fair representation claim to determine whether a causal link existed between the NFLPA's misconduct and the arbitration award. *See* Doc. No. 125 at 15-16. The Court recently cited these same pages for the proposition that it dismissed Johnson's retaliation claims "as part of Johnson's duty of fair representation claim…" Doc. No. 150 at 2. In doing so, the Court implicitly acknowledged Johnson brought an LMRDA retaliation claim.

Whether the NFLPA's misconduct impacted the arbitration award does not affect his LMRDA retaliation claim, which requires the application of an entirely different standard. "To successfully state a claim for retaliation in violation of the LMRDA, a plaintiff must establish the following: (1) his conduct constituted free speech in violation of the LMRDA; (2) that the speech was a cause for the Union taking action against him; and (3) damages." *Leavey,* 2015 U.S. Dist.

LEXIS at *19-20 (internal citations omitted) (*citing Commer v. McEntee*, No. 00-cv-7913 RWS, 2006 WL 3262494, *10, 2006 U.S. Dist. LEXIS 82395, *30 (S.D.N.Y. Nov. 9, 2006)).

Under the LMRDA, the retaliation need not be significant and includes such minimal actions as ordering the surveillance of a member (*see Guzman v. Bevona*, 90 F.3d 641, 648-49 (2d Cir. 1996)) or taking action that could threaten the freedom of members to speak out (*see Schermerhorn v. Local 100, Transp. Workers Union*, 91 F.3d 316, 323 (2d Cir. 1996)). As contemplated by these cases, the NFLPA's public statements adverse to Johnson, refusal to assist him with his appeal, and continued refusal to provide him a copy of the Policy all constitute retaliation and create genuine issues of material fact. *See* Ex. 1 at ¶ 10.

Applying the LMRDA retaliation standard requires factual determinations, which the NFLPA does not address in its present briefing. This Court should not conflate Johnson's duty of fair representation claim with his LMRDA retaliation claim, as the legal standards for these claims are entirely different. Compare the LMRDA retaliation standard set forth in *Leavey* above to the duty of fair representation standard set forth in *Vaca v. Sipes*, 386 U.S. 171,190 (1967). This Court should not grant summary judgment on Johnson's LMRDA retaliation claim because: (1) Johnson clearly included the claim in his Amended Complaint; (2) Johnson has not abandoned the claim; and (3) whether the NFLPA retaliated against Johnson requires factual determinations that the NFLPA does not address and cannot be addressed at summary judgment.

III. JOHNSON IS ENTITLED TO AND HAS NOT WAIVED HIS RIGHT TO A JURY TRIAL

A. Johnson Is Entitled to a Jury Trial on His LMRDA Claims

This Court has long held that a jury trial is available under the LMRDA. *See Paley v Greenberg*, 318 F. Supp. 1366 (S.D.N.Y. 1970). The Supreme Court confirmed as much by answering the following question in the affirmative, is "a union member who sues his local union

for money damages under Title I of the [LMRDA] entitled to a jury trial…" *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, syllabus, 95 (1991). Like the Plaintiff in *Wooddell*, Johnson sued the NFLPA under Title I of the LMRDA, including Sections 101 and 104, and is entitled to a jury. Specifically, Johnson brings his claims for the NFLPA's violations of Section 101, Section 104, and Section 609 of the LMRDA under Section 102 of the LMRDA (29 U.S.C. § 412), which is the LMRDA's civil enforcement mechanism. *See* 29 U.S.C. § 412 ("any person whose rights secured by the provisions of [Title I] have been infringed by any violation of this title may being a civil action…") and § 529 ("provisions of section 102 shall be applicable in the enforcement of [Section 609]").

The NFLPA cites the Sixth Circuit's decision in *McCraw v. United Ass'n of Journeyman & Apprentices of Plumbing etc.*, 341 F.2d 705 (6th Cir. 1965) for the proposition that a right to a jury is not applicable to claims brought under Section 102 of the LMRDA. *See* Doc. No. 135 at 16-17. In relying on *McCraw*, the NFLPA does not address the Supreme Court's subsequent *Wooddell* decision and controlling precedent from the Second Circuit that analyzed and disagreed with the holding in *McCraw* -- *Feltington v. Moving Picture Machine Operators Union etc.*, 605 F.2d 1251, 1257-58 (2d Cir. 1979). In direct conflict with *McCraw*, in *Feltington*, the Second Circuit held:

> ***[A] plaintiff suing under § 102 of the LMRDA is entitled to a jury trial of his damage claims notwithstanding the joinder of such claims with a request for equitable relief.***

Id. at 1258 (emphasis added). The Second Circuit reasoned that "a party is entitled to a jury trial of a claim traditionally viewed as one to enforce 'legal rights,' 'incidental' to an equitable claim." *Id*. at 1257-58. Johnson sues under Section 102 to enforce both his failure to provide

him a copy of the Policy claim and his retaliation claim. Under *Feltington*, Johnson is entitled to a jury on both his LMRDA claims.

Next, the NFLPA continues its improper reliance on *McCraw* to argue Johnson is not entitled to a jury, because his LMRDA remedies are solely equitable. *See* Doc. No. 135 at 16-17. In doing so, the NFLPA continues to ignore Johnson's retaliation claim and focuses entirely on his Section 104 claim. *See* Doc. No. 135 at 17. At least one court, though not detailing the specific damages available under Section 104, contemplated "possible damage[s] resulting from" a union member being deprived a copy of a collective bargaining agreement under Section 104. *Baker v. General Motors Corp.*, 745 F. Supp. 1275, 1278 (N.D. Ohio 1990).

There also are a number of cases analyzing the damages available under Section 102 for other violations of the LMRDA's Bill of Rights. The following cases, all of which were brought under Section 102 -- the same statute under which Johnson seeks to enforce his LMRDA claims, make clear that damages available under Section 102 include compensatory damages, punitive damages, and attorneys' fees and costs: *Hall v. Cole*, 412 U.S. 1, 8-9 (1973) (attorneys' fee available to party who prevails on a LMRDA claim); *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 77, 90-91 (2d Cir. 2003) (jury award of attorneys' fees to a union member that prevailed on a LMRDA claim appropriate even where jury did not award the union member compensatory damages); *Berg v. Watson*, 417 F. Supp. 806, 812-13 (S.D.N.Y. 1976) (punitive damages available under the LMRDA); and *Quinn v. Di Giulian*, 739 F.2d 637, 646, 648-52, (D.C. Cir. 1984) (plaintiff entitled to jury trial on damages resulting from a union's

breach of the LMRDA, which may include: actual damages, including mental distress and harm to reputation; punitive damages; and attorneys' fees).[2]

Regarding attorneys' fees, the Second Circuit in analyzing the Supreme Court's *Hall v. Cole* decision, stated:

> the Supreme Court held that union members who succeed in vindicating rights guaranteed them by § 101 of LMRDA through an action under § 102 may recover attorney's fees…

Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, etc., 749 F.2d 1000, 1004 (2d Cir. 1984). The Supreme Court's reasoning in *Hall*, 412 U.S. at 8, is instructive:

> there can be no doubt that, by vindicating his own right of free speech guaranteed by § 101 (a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs." *Yablonski v. United Mine Workers of America*, 150 U. S. App. D. C. 253, 260, 466 F.2d 424, 431 (1972). Thus, as in *Mills*, reimbursement of respondent's attorneys' fees out of the union treasury to the text of the note simply shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills v. Electric Auto-Lite Co.*, supra, at 397. *See also Yablonski v. United Mine Workers of America*, supra; *Robins v. Schonfeld*, 326 F.Supp. 525 (SDNY 1971); *Cefalo v. International Union of District 50 United Mine Workers*, 311 F.Supp. 946 (DC 1970); *Sands v. Abelli*, 290 F.Supp. 677 (SDNY 1968). We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Lite Co.*, supra, at 391-392.

Two years prior to *Hall*, the Supreme Court stated that a plaintiff is entitled to whatever damages flow from a union's violation of LMRDA:

[2] *See Hodges v. Virgin Atlantic Airways, Ltd.*, 714 F. Supp. 75, 77 (S.D.N.Y. 1988) (recognizing the *Quinn v. Di Giulian* decision, including that a claim for damages under the LMRDA sounds in tort).

> the critical question in this action is whether Hardeman was afforded the rights guaranteed him by § 101 (a)(5) of the LMRDA. If he was denied them, Congress has said that he is entitled to damages for the consequences of that denial.

International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 241 (1971).

Johnson's damages are more than equitable (*see*, e.g., Ex. 1 at ¶ 8), and he is entitled to a jury on his LMRDA retaliation claim, which he seeks to enforce under Section 102. Regarding Johnson's Section 104 claim, which he also seeks to enforce under Section 102, the NFLPA offers no reason to limit the damages available under Section 102 to a complete copy of the Policy or otherwise deviate from the reasoning in *Hardeman*, *Hall*, and *Rosario*.

B. A Responsive Pleading Remains Outstanding such that Johnson's Jury Demand was Timely and Proper

On October 19, 2018, Johnson filed and served his jury demand on all parties. Doc. No. 127. Civil Rule 38(b) states:

> (b) DEMAND. On any issue triable of right by jury, a party may demand a jury trial by:
>
> > (1) serving the other parties with a demand—which may be included in a pleading—***no later than 14 days after the last pleading directed to the issue is served***

FED. R. CIV. P. 38(b) (emphasis added).

The NFLPA has never filed an Answer to Johnson's Amended Complaint (i.e., the "last pleading" has not been served). The NFLPA's argument that the "last pleading" was its Answer to Johnson's original Complaint (*see* Doc. No. 135 at 15) conflicts with Civil Rule 38 and ignores Johnson's Amended Complaint (Doc. No. 39). By the plain language of Civil Rule 38, Johnson's jury demand was proper and timely.

The NFLPA also argues that Johnson's Amended Complaint did not revive his right to demand a jury trial because (1) he did not include a jury demand and (2) the amendment did not

change the issues. Civil Rule 38 eliminates the NFLPA's first argument. As to the NFLPA's second argument, Johnson's Amended Complaint changed the issues before the Court. As detailed above, Johnson added to his Amended Complaint a new retaliation claim under the LMRDA. *See* Doc. No. 39 at ¶ 314.

Johnson also added a new breach of the duty of fair representation claim to his Amended Complaint. *See* Doc. No. 39 at ¶¶ 316-332. Johnson also expanded on many of his other claims and included a number of additional facts not included in his original Complaint. *See*, e.g., Doc. No. 39 at ¶¶ 118, 138, 142-144, 191-200, 217, 218, 236-238, 287(a)-(d), 289, 292, 294-296, 298, 307, 311, 312, 342, 343, 345(e), and 345(k). Johnson's Amended Complaint changed the issues of the case such that it revived his right to a jury trial.

CONCLUSION

Johnson respectfully requests that the Court deny the NFLPA's Motion for Summary Judgment and permit Johnson to proceed to trial, before a jury, in which he seeks compensatory damages, punitive damages, and attorneys' fees and costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 16, 2019 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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